IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7081 OF 2005

Rajiv P. Samani — Petitioner
versus
Mrs.Dipti R. Samani — Respondent

Petitioner in person.
Mr.Chetan Mehta for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 3rd August 2006

PC :

1. After Review Petition was disposed of and this Writ Petition was restored to file, both sides agreed that it be heard forthwith. By consent of parties the writ petition is taken up for admission. Rule. Returnable forthwith by consent. Respondent waives service.

2. It is not in dispute that the respondent-wife has filed Matrimonial Petition No.A-1259/2003, inter alia, praying for divorce on the grounds of cruelty under section 13(1)(i-a) of the Hindu Marriage Act, 1955. The main matrimonial petition is pending.

3. It appears from the record that the respondent-wife applied for an ex-parte order in the petition because the petitioner-husband did not file any written statement. The petitioner-husband denies this fact and contends that in fact instructions were given to the advocate engaged by him to draft a written statement and place the same on record. The petitioner was so assured by the learned advocate. The correspondence with the learned advocate is placed on record of the writ petition. It is in these circumstances that the application Exhibit-60 was filed for recalling an order of the Family Court directing that the M.J.Petition should proceed on the basis of "No Written Statement". A request was made that the written statement which is ready be taken on record.

4. These applications have been rejected.

5. Petitioner is challenging the order dated 22nd July 2004 directing that the matter will proceed without written statement so also the order below Exhibit-60 dated 27th April 2005 refusing to recall the direction as above. These orders are subject matter of challenge in this

writ petition under Article 227 of the Constitution of India.

6. With the assistance of learned advocates appearing for both sides I have perused the petition and the annexures thereto so also the orders under challenge.

7. In my view, considering the fact that serious allegations are made against the petitioner-husband by the respondent-wife, it was in the fitness of things so also in the interest of justice that an opportunity was afforded to the petitioner-husband to place his version on record. Considering the fact that the Family Court is not bound by procedural laws but has to act in accordance with broad principles of natural justice, fairness and equity, it was expected from the Family Court that it would recall a drastic order of proceeding without written statement. In the facts and circumstances of this case and when settlement talks were in progress no prejudice would have been caused to the respondent-wife if the written statement had been allowed to be tendered and taken on record.

8. Shri Mehta appearing for respondent-wife invites my attention to the observations of learned Judge of the Family Court in paras 11 to 13 of the order under challenge and submits that once there a finding of negligence, then no indulgence be shown to the petitioner-husband by extending equitable and discretionary as well as extraordinary jurisdiction of this Court.

9. In my view, considering the facts and circumstances of present case and further that omission or error of the Advocate ought not to prejudice a litigant, it is desirable and in the interest of justice that the orders under challenge are set aside. The written statement be taken on record. Accordingly, it be taken on record. However, all this is subject to payment of costs by the petitioner-husband to respondent-wife quantified at Rs.5,000/-. Payment of costs is condition precedent.

10. Upon proof of costs being tendered, the Family Court to take the written statement of the petitioner-husband on record and thereafter proceed with the matter on merits and in accordance with law.

11. Needless to state that all interim applications shall also be considered and dealt with on their own merits and in accordance with law. Neither this order nor any observations therein shall prejudice the parties from raising appropriate contentions before the Family Court, either in the main matter or in the pending interim applications.

12. Without prejudice to the rights and contentions of both sides, in the main application as also in the interim pending application and purely as an ad-hoc measure, the petitioner-husband is directed to pay maintenance @ Rs.5,000/- per month for the daughter "Dhyana". It is further agreed that the said amount will be forwarded by a pay order/DD to the respondent-wife’s advocate in the Family Court.

13. In the light of this it is further agreed and that too purely as an ad-hoc measure that the respondent-wife would grant access to the petitioner-husband to their daughter "Dhyana" every Saturday between 4.30 p.m. to 7.30 p.m.. The child would be brought at Cross Roads situate at Haji Ali near Mahalaxmi Temple and the petitioner would have uninterrupted access to the

child during the above period.

14. The above order pertaining to maintenance as also access is purely ad-hoc and without prejudice to the rights and contentions of both sides in the interim proceedings as also the main matter.

15. It is agreed between the parties that the payment would be made by a pay order/DD as above, drawn in the name of respondent-wife, on or before 10th of each month. The first pay order/DD to be forwarded on 10th September 2006.

16. This order does not prevent the parties from applying for modifications of these ad-hoc arrangements and such application for modification if made by parties, shall be dealt with on its own merits and in accordance with law by the Family Court without being influenced by any observations made herein.

17. Rule made absolute in the above terms. No order as to costs in the writ petition.

(S.C.DHARMADHIKARI, J.)